IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1208

LOUISE ORR ESTABROOK,
Petitioner,
v.
WATSON W. WISE and
PHILLIPS PETROLEUM COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are as set forth in the Petition.

JURISDICTION

The claimed basis for jurisdiction is set forth in the Petition.

QUESTION PRESENTED

Whether a decision by a Florida appellate court that an action in Florida by a Texas resident against her former spouse to establish an interest in Florida realty was barred on the

principle of res judicata by an earlier Texas divorce decree which dissolved these parties' marriage properly presents a full faith and credit question for this Court's review, where:

I. The decision of the Florida court also rested upon other independent and adequate state grounds, and
II. Petitioner failed to follow state procedure which required that she plead and prove in the Florida trial court the applicability of Texas law to and its effect upon the defense that the Texas divorce decree was a bar to the Florida proceeding, and
III. Petitioner failed to prove in the Florida courts that the Texas divorce decree would not operate under Texas law as a bar to her action.

CONSTITUTIONAL PROVISION INVOLVED

The claimed pertinent provisions of the United States Constitution (Art. IV, §1) are set forth in the Petition at page 4.

STATEMENT

This is a petition for certiorari by the plaintiff[1] in the trial court from a decision of the District Court of Appeal of Florida, First District, affirming a summary judgment for defendants entered by the Circuit Court for Santa Rosa County, Florida.

The trial court did not recite the basis for its decision for defendants (PX. 44A-45A). Upon review, the District Court of Appeal concluded that there were several valid grounds upon which to sustain the trial court's judgment. It expressly held that the action by plaintiff to establish an implied trust in Florida

1 In this brief the Petitioner may sometimes be referred to as the "plaintiff". Similarly, "defendants" may sometimes be used with regard to Respondents; "PX" will be used to refer to the appendix filed by Petitioner; "RX" will be used to refer to the additional appendix filed by Respondents; "R" will be used to refer to the original record filed in the District Court of Appeal of Florida.

realty was barred by the doctrine of res judicata because of an earlier Texas divorce decree which had dissolved the marriage between plaintiff and defendant Wise.

Plaintiff filed her complaint in the Florida circuit court in 1974 to impose a trust in favor of herself upon certain mineral rights in Florida real estate held in the name of defendant Wise and leased, in part, to defendant Phillips Petroleum Company (PX. 1A-11A). Recognizing that Florida is not a community property state (PX. 5A-6A), plaintiff's complaint asserted that the *funds* used by defendant Wise to acquire the Florida interests in the 1940's presumptively belonged one-half to plaintiff by virtue of the Texas community property laws (PX. 5A).

Plaintiff and defendant Wise, both Texas residents, had been married in Texas (a community property state) in 1930. In the early 1940's, Watson Wise, then employed in his father's oil business, began a series of travels throughout Alabama, Mississippi and Florida. For the first half of that decade, Watson Wise bought and sold numerous speculative mineral interests in those states. The purchases were frequently joint purchasing arrangements brought together between Watson Wise and others (Wise depo. pp. 9-10, 17-19/R 348-49, 356-58). Funds to purchase the interests taken in Watson's name were supplied by Watson's father, Mr. W. A. Wise (Wise depo. pp. 17-18/R 346-7). The underwriting of Watson's purchases by his father was not revealed by Watson to the others with whom he dealt. (Wise depo. p. 33/R 362). Watson chose to maintain the appearance that he himself was the sole enterprising adventurer (Wise depo. p. 18/R 347). Accordingly, all of those interests appearing in Watson's name were in fact purchased with funds from Watson's father and, therefore, the equitable interest was totally in Mr. W. A. Wise (RX. A2).

The only written evidence regarding the source of funds to purchase the property is the copy of the agreement between

Watson Wise and his father, W. A. Wise. That agreement states:

October-1-1943 Tyler, Texas

To Dad:

I, Watson Wise, agree to assign any and all purchases to my father, W. A. Wise, Owens Building, S. Broadway, Tyler, all mineral leases, overrides or other land lease purchases that may be bought by me and carried in my name in Louisiana, Mississippi, Alabama, Florida, so long as W. A. furnishes the expense money and payments for the above realty. Any brokerage shall be my exclusive profit and shall apply to my expense and livelihood. If profits are realized on these after the deductions of expense of all leases, land, mineral purchases, then I shall have a one-quarter interest in the profits.

Signed,
Watson W. Wise

W.A.W.

The writing is in Watson Wise's handwriting, and is initialed by his father, W. A. Wise (RX. A3). Because Watson purchased the properties in his name with his father's funds, he and his dad felt that their agreement should be written (RX. A3).

The trading of mineral interests in Florida subsided when it appeared that the interests had no value. Mr. W. A. Wise died in 1947 (Wise depo. p. 11/R 340), after the lapse of interest in the Florida minerals. Prior to his death, however, Mr. Wise made a gift of the properties to his son, Watson, and his daughter, Ruth Ranck (RX. A2).

In 1964 Louise Orr Wise, now Louise Orr Estabrook, filed suit for divorce in Texas against Watson Wise. In that proceeding, Mrs. Estabrook sought a divorce and an adjudication of her property rights. Upon filing the divorce complaint, Respondent Wise was enjoined from going to the home of the parties and from moving or in any way secreting any of the assets of the parties or the records regarding the assets (PX. 37A-41A).

During the course of the divorce action, Respondent Wise was required to produce an inventory of his properties (PX. 40A). The parties set to work through their representatives to compile data recorded in dozens of filing cabinets (William E. Wise depo. pp. 6-9), (Turman depo. p. 14/R 443). The enormity of the task is reflected by the inventory (R 152-255) eventually prepared which shows that Watson Wise and Louise Orr Estabrook divided properties valued in the millions of dollars. The assets consisted of some three companies owned and operated by Wise, four farms, a house in Colorado, a house in Tyler, Texas, numerous bonds and savings accounts, approximately 90,000 shares of stock of 70 companies, some 80 division orders representing interests in active oil production, along with various other assets.

The interests in the Florida minerals involved in the instant case were not included in this inventory. Mr. Edgar Turman, an employee of the Wise companies who was assigned primary responsibility to assemble records and carry them to Mrs. Estabrook's attorney for security, has offered direct testimony suggesting that the records of Florida properties were simply overlooked (RX. A4). Mr. Turman appears to have had a neutral role in the proceedings, and in fact, subsequent to the divorce, worked for both Petitioner and Respondent Wise (Turman depo. p. 7/R 436; Estabrook depo. p. 29/R 497).

Prior to the entry of the final decree of divorce on May 25, 1956, the parties entered into an agreement which provided that if either party thereafter desired to claim that some community property had not been divided, then they would be free to do so (PX. 9A-11A). The final judgment, however, was entered in a form which provided only that "all issues as to the existence or disposition of community property rights, or other property rights, have, by the amended pleading filed herein, been withdrawn and eliminated from this cause." (PX. 23A).[2]

2 Although the District Court of Appeal's opinion refers to the Texas divorce decree as "incorporating the terms of the property settlement agreement between the parties" (PX. 51A), it is apparent from the decree that there was no such incorporation but rather a *withdrawal* of all property issues (PX. 23A).

Petitioner clearly had, at one time, actual knowledge of her husband's trips to Florida (RX. A5). Her statements on deposition relate that she recalled such knowledge after the inquiry by one Farrington subsequent to her divorce about leasing what he described as "her" interests in Florida (RX. A5). Also, several documents have been placed in the record which bear the Petitioner's signature and which are conveyances prior to the divorce of parts of the interests involved in this action (Estabrook depo. pp. 19-22/R 47-90). A conclusion that can be reached with respect to Petitioner's knowledge is that she did not recall her actual knowledge of her husband's business in Florida at the time of the divorce. Watson Wise has indicated that he, too, did not recall the existence of these interests at the time of the divorce (Wise depo. p. 63/R 392).

During the trial court proceedings in the instant case, Petitioner stated that the factual basis for her claim was only the Texas statutory community property presumption (RX. A1).[3] Answering an interrogatory from Respondent Phillips Petroleum Company questioning what facts were relied upon to support the allegation that community property funds were used to purchase the subject properties, Petitioner stated:

> The purchase of the subject mineral interests during the marriage, with no credible evidence being known to Plaintiff which would establish that the property was acquired other than by use of community funds; the presumptions that apply in such circumstances under Texas law (RX. A1).

While Respondents raised in the trial court a number of different defenses to Mrs. Estabrook's claims, the most important ones were those enumerated by the District Court of Appeal in its opinion (PX. 50A-51A):

3 The Texas community property statute creating this presumption and the admission of its inapplicability to property acquired by a spouse through gift or devise are set out in Petitioner's main brief (Brief of Appellant) in the District Court of Appeal. See RX. A10-A11.

1) Statute of Limitations.
2) Laches.
3) The Florida property was not purchased with community funds.
4) Petitioner's claim was founded upon a community property agreement entered into in Texas and upon the community property law of Texas which has no effect upon real property located in Florida.
5) This action was barred by entry of the Texas divorce decree between Petitioner and Respondent Wise.

The District Court of Appeal, after concluding that several of the foregoing grounds were sufficient to sustain the summary judgment for Respondents (PX. 51A), went on to discuss and expressly hold that the present action was barred by the Texas divorce decree. The Florida Supreme Court denied Mrs. Estabrook's petition for certiorari (PX. 64A).

ARGUMENT

The petition for certiorari should be denied pursuant to this Court's long-standing principle that it will not review state court judgments based upon adequate and independent state grounds. In the present case, the Florida District Court of Appeal expressly determined that there were "several" valid bases for the trial court's summary judgment, of which only one is claimed by Petitioner to involve a federal question. One or more of the remaining grounds are not only independent state grounds, but are also adequate in the sense that they are broad enough to support the judgment of the state courts.

Moreover, the federal question Petitioner seeks to bring to this Court, *i.e.*, whether Florida courts gave full faith and credit to the Texas divorce decree, was not properly raised and developed in the Florida courts, because the application of Texas law to the effect of the divorce decree in the Florida courts was not pleaded and proved as required by Florida practice, and, in any event, Petitioner failed to prove that application of Texas law in this regard would require a different result.

I

THE DECISION BELOW RESTS UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has consistently adhered to the principle that it will not review a state court judgment based upon an adequate and independent state ground. *Durley v. Mayo*, 351 U.S. 277 (1956); *Stembridge v. Georgia*, 343 U.S. 541 (1952); *Herb v. Pitcairn*, 324 U.S. 117 (1945). And where the state court bases its decision on both federal and nonfederal grounds, and a state ground is sufficient to sustain the judgment, this Court will not undertake to review it. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934); *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257 (1872).

Indeed, it has been said that where adequate state grounds are asserted and appear reasonable, "Petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below." *Durley v. Mayo*, 351 U.S. at 281. The burden of establishing jurisdiction is not met if "it appears that the judgment *might* have rested upon a nonfederal ground." *Stembridge v. Georgia*, 343 U.S. at 547.

As reflected by the opinion of the District Court of Appeal (PX. 49A-53A), this action was originally commenced by Petitioner in the Circuit Court for Santa Rosa County, Florida, to establish a trust in her favor in certain Florida mineral interests. Petitioner, a resident of Texas at all times, contended that during her marriage to respondent Wise from 1930 to 1964, Wise used community property funds to acquire these Florida mineral interests.

Respondents defended on a number of grounds, five of which were enumerated by the District Court of Appeal in its opinion (PX. 50A-51A). These defenses included:

1) Statute of Limitations.
2) Laches.
3) The Florida property was not purchased with community funds.
4) Petitioner's claim was founded upon a community property agreement entered into in Texas and upon the community property law of Texas which has no effect upon real property located in Florida.
5) This action was barred by entry of the Texas divorce decree between Petitioner and Respondent Wise.

After the foregoing enumeration of defenses, the Florida appellate court stated (PX. 51A):

> The trial court did not recite any specific grounds in its final summary judgment upon which to enter same. Our review of this extensive record discloses *several valid grounds* upon which to sustain same; however, we will confine our comments to the latter ground based upon the Texas divorce (emphasis added).

Petitioner, of course, seeks review in this Court because of the District Court of Appeal's comments concerning the res judicata effect of the Texas judgment. She does not discuss any of the other grounds mentioned by the court, and there is no attempt to demonstrate that grounds 1 through 4 cannot account for the lower court's decision. Under the jurisdictional tests formulated by this Court, the burden is upon Petitioner to demonstrate that not one of the first four defenses is an independent state ground which is adequate in the sense of being broad enough to account for the summary judgment in favor of Respondents. *Durley v. Mayo, supra; Stembridge v. Georgia, supra; Lynch v. New York ex rel. Pierson, supra; Klinger v. Missouri, supra.* Since Petitioner has failed to discharge this burden, further review of the decision of the District Court of Appeal should be declined by this Court.

The judgment of the Florida appellate court is expressly based upon "several valid grounds", only one of which is

asserted by Petitioner to involve a federal question. In *Klinger v. Missouri, supra,* this Court stated:

> But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case. 80 U.S. (13 Wall.) at 263.

See also Lynch v. New York ex rel. Pierson, 80 U.S. (13 Wall.) at 54-55.

A few years later, in *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875), this Court described the extent to which it would inquire into state law to determine the sufficiency of a state ground:

> 6. If [the federal question] was erroneously decided against plaintiff in error, then this Court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue. 87 U.S. (20 Wall.) at 636.

The independence of grounds one through four can hardly be questioned. The statute of limitations and laches are clearly matters of state law which are unrelated to the effect of the Texas divorce decree. Likewise, the question of whether, in fact, the Florida mineral interests were purchased with community funds stands completely apart from the federal question Petitioner seeks to have reviewed. The fourth ground involves the question of whether the Texas community property law and the community property agreement entered into between Petitioner and Respondent Wise shortly before their divorce can have any direct effect upon Florida real property and it does not rely upon the divorce decree in any way.

The adequacy of at least the first three enumerated grounds as a basis for supporting a judgment in favor of the Respondents is clearly apparent when measured against the standards set by this Court in *Murdock v. City of Memphis, supra.* A finding by the lower court that Petitioner's claim of interest in Florida mineral rights was barred by the statute of limitations or on principles of laches would completely dispose of the entire case. Likewise, a finding that the Florida interests were not purchased with community funds would also be broad enough for complete resolution of the action in favor of Respondents, as there was no other basis alleged in Petitioner's complaint for her claim of interest (PX. 1A-11A).

The fourth ground, *i.e.,* that the community property agreement and community property law of Texas can have no direct effect upon Florida real property, is probably not an adequate ground because Petitioner's effort in this litigation was to establish a trust in Florida real property based on an alleged community property interest in Texas funds, rather than to seek a declaration that the Florida property was itself community property. However, it is doubtful that the District Court of Appeal had this fourth ground in mind when it referred to "several valid grounds" to sustain the judgment of the trial court, for that appellate court disposed of ground four expressly during its discussion of the effect of the Texas divorce decree when it stated: "Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state's community property law" (PX. 52A).

Ground three in the District Court of Appeal's opinion, *i.e.,* that the Florida interests were not purchased with community funds, was not only an independent and theoretically adequate basis to support the judgment for Respondents, but it was also an adequate basis in fact. In the trial court, Petitioner had largely if not entirely relied upon a certain Texas rebuttable presumption declaring the community nature of property acquired during marriage to establish her interest in the funds used by Respondent Wise to purchase the Florida mineral interests (RX. A1).

The evidence before the trial court to rebut the presumption relied on by Petitioner to establish a community property interest in the purchase funds is described in Respondents' Statement in this brief at pages 3-5, *supra*. In summary, this evidence showed that Respondent Wise used his father's funds to acquire the Florida mineral interests, pursuant to a written agreement. The property was taken in Respondent Wise's name for convenience. Shortly before his death, Mr. W. A. Wise, Respondent Wise's father, made a gift of the properties to Respondent Wise and his sister. Property acquired by one spouse by gift during the marriage is not deemed to be community property under Texas law (RX. A10).

To decide whether the Florida property was purchased with community funds, the Florida court had first to determine the nature of the Texas community property presumption, *i.e.*, whether procedural or substantive, and if found to substantive, and therefore deemed applicable in Florida, the Florida court was faced with the further question of whether the bare presumption could suffice to meet the heavy burden of proof under Florida law to establish an implied trust in real property. *See, e.g., Lofton v. Sterrett*, 23 Fla. 565, 2 So. 837 (1887), where the court stated that the evidence to establish a trust in real estate must be "...so clear, strong and unequivocal as to remove from the mind of the chancellor every reasonable doubt as to the existence of the trust." *See also Geter v. Simmons*, 57 Fla. 423, 49 So. 131 (1909). Finally, the Florida court may have been faced with the question of whether, if applicable and sufficient to create a prima facie case for imposition of an implied trust in Florida real estate, the Texas presumption was rebutted by the presence of direct, contrary evidence in accordance with the law of Florida relating to the evidentiary effect of presumptions. *See, e.g., Gulle v. Boggs*, 174 So.2d 26 (Fla. 1965).[4]

4 For a somewhat fuller discussion of these points, Respondents have reproduced in the appendix hereto certain portions of their brief in the Florida District Court of Appeal (RX. A11-A15).

Respondents submit that the lower courts certainly could have decided that the Texas community property presumption was procedural and therefore that it was not necessary to apply it in Florida. Such a decision would have left Petitioner's claim of interest with virtually no factual support. The lower court could also have well decided that in any case the presumption could not, standing by itself, meet the standard of proof necessary to create an implied trust in real estate. Or, the court could have determined that the presumption was insufficient to establish a prima facie case for imposition of a trust in the face of the direct, rebutting evidence of Respondents. Any of these rulings would have decided adversely to Petitioner the issue of whether the Florida interests were purchased with community funds and would have resulted in judgment for Respondents on this adequate and independent state ground. Because Petitioner has failed to demonstrate that this state law ground *could not* support the judgment of the District Court of Appeal, this Court should decline to grant Petitioner further review.[5]

II

IN THE TRIAL COURT THE PETITIONER NEITHER PLEADED NOR PROVED THE APPLICABILITY OF TEXAS LAW TO RESPONDENT'S AFFIRMATIVE DEFENSE THAT THE PRIOR TEXAS DIVORCE JUDGMENT WAS A BAR TO THIS PROCEEDING.

Respondent Wise asserted the Texas final judgment of divorce as a bar to the present action as his affirmative defense number six (PX. 21A). The Petitioner filed a simple denial to this affirmative defense (PX. 25A). She made no attempt either to plead or to prove the applicability of Texas law to this defense, although Florida law specifically requires a party relying on foreign law to plead the law upon which she relies.

5 The District Court of Appeal could also have based its affirmance of the trial court's summary judgment for Respondents on the independent defense of laches. Rather than extend further this portion of the brief, Respondents have reproduced in the appendix hereto that section of their brief in the Florida appellate court dealing with laches (RX. A15-A19).

See Movielab, Inc. v. Davis, 217 So.2d 890 (Fla. 3d Dist. Ct. App. 1969), and the numerous authorities cited therein.

In argument before the trial court on this issue, Petitioner confined herself solely to the application of the law of the State of Florida (See that portion of Petitioner's brief to the trial court directed to this issue RX. A5-A10). In the absence of any pleading or proof of Texas law on this issue, the Florida trial court correctly applied the law of Florida in determining that the Texas final decree of divorce entered some ten years earlier barred this suit. *Coyne v. Coyne*, 325 So.2d 407 (Fla. 3d Dist. Ct. App.), *cert. denied*, 339 So.2d 1168 (Fla. 1976); *United Mercantile Agencies v. Bissonnette*, 155 Fla. 22, 19 So.2d 466 (1944).

In her reply brief in the District Court of Appeal, the Petitioner for the first time in this lawsuit attempted to argue the applicability of Texas law to the question of whether she was barred from bringing this action to determine the title to Florida property by the prior final judgment of divorce.

The Respondents immediately filed with the appellate court a supplemental brief citing the well established Florida rule that if a litigant is to rely upon the law of a foreign state, she must plead and prove that law at the lower court level (RX. A19-A21).

In order for the applicability of foreign law to be raised as an issue on appeal, the foreign law must have pleaded and proved at the trial court below. *See Movielab, Inc. v. Davis, supra*, and *Miller v. Shulman*, 122 So.2d 589 (Fla. 3d Dist. Ct. App. 1960), where the court stated the applicable appellate principle as follows:

> The absence from the record of both pleading and proof of foreign law precludes our consideration of this contention raised for the first time in appellant's brief. 122 So.2d at 590.

The failure of Petitioner to plead, present proof or request the trial court to take judicial notice of the law of Texas and its applicability to this issue precluded the consideration of Texas law by the District Court of Appeal. The Petitioner's presentation of Texas law and argument of its applicability for the first time in her reply brief in the Florida District Court of Appeal was too late to raise a full faith and credit question under the constitution because the Florida District Court of Appeal was required to review the judgment of the trial court in light of the law and evidence presented to the trial court. For the same reason, the Florida Supreme Court was precluded from considering Petitioner's argument as to Texas law on the petition for certiorari, which it denied without opinion.

A federal question which the highest court of a state is, by its settled practice, required to disregard because it was not seasonably raised in the trial court, will not serve as a basis for jurisdiction of this court. Such non-compliance with local procedural rules is an adequate state ground for the decision below. *Durley v. Mayo, supra; Edelman v. California*, 344 U.S. 357 (1952); *Hulbert v. City of Chicago*, 202 U.S. 275 (1906); *Mutual Life Insurance Company of New York v. McGrew*, 188 U.S. 291 (1903).

As the Texas law was not properly brought to the attention of the Florida courts, the Petitioner has omitted an essential step in invoking the full faith and credit clause. *Gasquet v. Lapeyre*, 242 U.S. 367 (1917); *Hanley v. Donoghue*, 116 U.S. 1 (1885).

III

PETITIONER FAILED TO MEET HER BURDEN OF PROVING TO THE FLORIDA COURTS THAT THE FINAL DECREE OF DIVORCE WOULD NOT OPERATE AS A BAR TO THESE PROCEEDINGS UNDER TEXAS LAW.

Although the Petitioner contends that the Texas divorce judgment would not have barred these proceedings in Texas,

she neither pleaded, sought judicial notice of, introduced into evidence nor cited in her briefs filed with the Florida appellate courts any Texas authority directly on point.

The Petitioner does cite portions of articles on Texas law and several Texas cases, including, *Thompson v. Thompson*, 500 S.W.2d 203 (Tex. Civ. App. 1973), and *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970), which hold that where all *community property* rights are not partitioned in a divorce decree, the judgment does not preclude a later suit seeking partition of undivided community property. There are other Texas cases which raise doubt that such is the law of Texas and indicate that the final decree of divorce is a bar to a subsequent proceeding seeking to partition property not presented to the divorce court. *See Ladd v. Ladd*, 402 S.W.2d 940 (Tex. Civ. App. 1966), *writ refused n.r.e.; Cannon v. Cannon*, 43 S.W.2d 134 (Tex. Civ. App. 1931), *writ refused*.

To the extent that the Texas courts allow parties to seek partition of community property which was not partitioned in the final divorce proceedings, they appear to do so because of the nature of community property in Texas, where the courts state: "An interest in community property is not a claim or right *against* the other spouse." *See Thompson v. Thompson*, 500 S.W.2d at 208. A careful reading of the opinion and dissent in *Busby v. Busby, supra*, indicates that the Texas Supreme Court would have found that action barred by res judicata if the majority had not determined that disability pay was community property.

In matters not involving community property, the law of Texas is in harmony with the law of Florida in holding that under the rule of res judicata a final judgment of divorce bars relitigation of all issues connected with a cause of action or defense which either were or might have been presented to the divorce court and determined thereby. *See Doherty v. Doherty*,

279 S.W.2d 690 (Tex. Civ. App. 1955); *Townsend v. Townsend*, 115 S.W.2d 769 (Tex. Civ. App. 1938).

Texas courts recognize that real estate in Florida held only in the name of the husband is not community property; it is the husband's separate property. *See Bell v. Bell*, 180 S.W.2d 466 (Tex. Civ. App. 1944), *writ refused; Walker v. Walker*, 231 S.W.2d 905 (Tex. Civ. App. 1950). They further recognize that the wife's claim to an interest in the husband's separate Florida property is a claim against her spouse which she could and should have made in the divorce action. *See Walker v. Walker, supra.*

It is, therefore, logical to conclude that if Petitioner had pursued this case in Texas, where she originally filed it, the Texas courts would not have followed their rule in regard to community property. As this is an action by which Petitioner seeks to compel Respondent to grant her an interest in his separate Florida property, the Texas courts would most likely have applied the rule of res judicata as it is generally applied in both Texas and Florida and held that the Petitioner is barred by the final divorce judgment.

If Petitioner had properly placed the issue of Texas law and its application before the Florida courts, she would have had the burden of showing the Florida courts that under Texas law the final judgment of divorce does not constitute the res judicata bar it does in Florida. Even if the authorities she presented in her briefs were considered, she did not meet her burden since those authorities speak only of community property, which is not here involved. This is particularly true as the Texas law in regard to the general application of the rule of res judicata to final judgments of divorce appears to be in harmony with the law of Florida. Petitioner simply has not shown any Texas authority that the final divorce judgment would not be a bar to this later proceeding in which the wife seeks an interest in her husband's separate property that she could have sought at the time of the divorce ten years earlier.

It follows that the Florida courts did not violate the full faith and credit clause when they held this action barred by the final judgment of divorce. *See Simons v. Miami Beach First National Bank*, 381 U.S. 81 (1965).

CONCLUSION

Petitioner has failed to demonstrate that she is entitled, under this Court's jurisdictional guidelines, to review by certiorari. Rather, she has attempted to argue again the merits of her claim which she has already pursued without success through three levels of Florida courts. In her attempt to secure review by one more court, she has sought belatedly to inject into the case a full faith and credit question which was never properly raised in the Florida courts. Petitioner has also overlooked the presence of adequate and independent state grounds for the judgment below.

For the foregoing reasons, certiorari should denied.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 1978, three copies of the Brief for Respondents in Opposition and Appendix were mailed, postage prepaid, to Wilmer H. Mitchell and Lawrence W. Oberhausen, 130 East Government Street, Pensacola, Florida 32501, counsel for the Petitioner. I further certify that all parties required to be served have been served.

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APPENDIX

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PORTIONS OF INTERROGATORIES OF DEFENDANT, PHILLIPS PETROLEUM COMPANY, TO PLAINTIFF, LOUISE ORR ESTABROOK

IN THE
CIRCUIT COURT FOR SANTA ROSA COUNTY, FLORIDA

CASE NO. 74-C-53

LOUISE ORR ESTABROOK,
Plaintiff,
vs.
WATSON W. WISE and
PHILLIPS PETROLEUM COMPANY, a Corporation,
Defendants.

(R. 80)

INTERROGATORIES OF DEFENDANT, PHILLIPS PETROLEUM COMPANY, TO PLAINTIFF, LOUISE ORR ESTABROOK

Defendant, PHILLIPS PETROLEUM COMPANY, by its undersigned attorney, hereby propounds the following Interrogatories to be answered by Plaintiff, LOUISE ORR ESTABROOK, in writing and under oath within the time allowed under the Florida Rules of Civil Procedure:

1. With regard to your allegations in paragraph 9 of the Complaint that "all of the interests in lands . . . described in this paragraph were acquired with community funds of Plaintiff, LOUISE ORR ESTABROOK, and Defendant, WATSON W. WISE . . .," please state with particularity:

a. The facts you rely upon.

The purchase of the subject mineral interests during the marriage, with no credible evidence being known to Plaintiff which would establish that the property was acquired other than by use of community funds; the presumptions that apply in such circumstances under Texas law.

* * * * * *

EXCERPTS FROM DEPOSITIONS

DEPOSITION OF WATSON W. WISE (R. 368-370, 400)

Direct Examination

* * *

By Mr. Mitchell:

[39] Q What I'm getting at is, for all of these interests that you acquired in your name and retained in your name at the time you acquired them. As between you and your father, who owned them?

A They were my father's.

[40] Q One hundred percent?

A My father had not told me that the boom was over. And my father later on told me, before he died, and I think my sister was there. And he said, "Well, if this is any good, you children have at least got something to make you some money." But these belonged to my dad.

* * * * *

Q Excuse me. I'm not interested in the rig. I'm talking about what we've got in this law suit.

A He paid for these. He paid for these. They were his. And before he died he told my sister and me. "If they ever amount to anything, why, you can have them."

Q Well, are you saying he gave you these properties or not?

[41] A Before he died.

* * * *

Q So, you then maintain that these interests which were purchased in your name were given to you and your sister, Ruth Rank, before your father died. Is that correct?

A He told us that they were ours. Yes.

* * * *

[71] Q There has been shown in various depositions and things, a memorandum dated October the 1st, 1943. It's in handwriting on lined paper.

A Yes.

Q It is in this —

A I'm familiar with it.

Q — Mr. Hodges' deposition, Joint Exhibit Number 1.

A Yes.

Q I probably should ask you to tell me if that is your handwriting, for instance, on the major portion of that.

A Yes. It is my writing.

Q And it says: "To Dad, Watson Wise, et cetera." Did you, yourself write that?

A Yes. I wrote that.

Q It has the date October 1, 1943. Was that date [72] written on at the time that this was done?

A All done at one time.

Q Do you recall actually the circumstances of when and where this was done?

A No, not exactly. Dad and I at one time or another, we were together. I think I was maybe going away, and I might have said, "Dad, maybe we should kind of have some kind of understanding about this thing. We've talked about it." And we just wrote a little memorandum out some place. I forget where it was.

Q Did you see him initial it at the bottom? Do you know those are his initials?

A Well, I can recognize my father's. I've got lots of papers that I have his initials on. And I recognize those as Dad's. Those are his initials.

Q Those are his initials?

A Those are my dad's initials.

Q Did he initial them in your presence?

A I think so.

* * * *

DEPOSITION OF EDGAR TURMAN (R. 442)

Direct Examination

* * *

By Mr. Mitchell:

[13] Q You were told then to get up all the property you could find. Would that be correct?

A That is correct.

Q Now, we have copies of that inventory submitted by Mr. Wise. And it does not contain any of the property that is currently involved in this law suit in Santa Rosa County, Florida. And the properties that we are talking about are in several Florida Counties, their mineral interests. Can you explain why those properties were not listed in that inventory? If you know.

A To the best of my knowledge, the reason that that or any other non-producing mineral properties, were excluded, was that they were just looked over. The problem is recalling ten years back. It's not easy. But, I worked on this thing almost a year, and somewhere in the shuffle, the non-producing minerals of some amount were overlooked. At the time I finished up with the situation I thought that I had everything pretty well nailed together, but obviously we didn't.

* * * * *

DEPOSITION OF LOUISE ORR ESTABROOK

(R. 482-83, 510)

Direct Examination

* * *

By Mr. Mitchem:

[14] Q When did Mr. Wise first start going to Mississippi, Alabama and Florida?

A I wouldn't remember. In fact, the first time that I did remember that he had gone to those specific places was when Mr. Farrington called me and asked me if I knew I had some property in Florida.

[15] Q You do remember him going now, don't you?

A After I talked with him on the phone, then I set down and tried to think. Because, I said, "No. I don't have any." And I did remember that he had gone to Florida. But that was the first recollection that I had.

* * * *

[42] Q Mrs. Estabrook, please tell me when you first, and I'll use the word 'remembered', since I know you must have known in '43 or '44 that he was over in Florida, when you first remembered he was over in Florida buying or looking after oil interests, or something, for anybody?

A Not until whenever it was that Mr. Farrington called me.

* * * * *

EXCERPT FROM PLAINTIFF'S BRIEF IN TRIAL COURT ON MOTION FOR SUMMARY JUDGMENT

* * * *

Is the Plaintiff Barred
by the Texas Divorce Action?

[39] Defendant Wise contends pursuant to his sixth affirmative defense that the Plaintiff is barred by virtue of the final decree of divorce entered in the Court of Domestic Relations in Smith County, Texas, May 25, 1965. Defendant Wise makes this contention in spite of the fact that the inventory he filed in the case did not list these properties, in spite of the fact that the stipulation of the parties of May 18, 1965, specifically provided,

> "...if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto.";

and in spite of the fact that the judgment in the divorce entered May 25, 1965, found,

> "...that all issues as to the existence of disposition of community property rights, or other property rights, have, by the amended pleadings filed herein, been withdrawn and eliminated from this cause."

[40] Defendant Wise by his memo (p. 3) asserts that it is well settled that a final decree of divorce settles all property rights of the parties and bars any action thereafter by either party to determine property rights "since the doctrine of res judicata is applicable even where property rights are not put in issue, if the issue could have been raised." Mr. Wise cites 10A Fla. Jur., *Dissolution of Marriage*, §269; *Finston v. Finston*, 160 Fla. 935, 37 So. 2d 423 (1948); *Dotter v. Dotter*, 147 So. 2d 209 (2 DCA Fla. 1962); *Jones v. Jones*, 140 So. 2d 318 (3 DCA Fla. 1962); *McEachin v. McEachin*, 154 So. 2d 894 (1 DCA Fla. 1963); and *Cooper v. Cooper*, 69 So. 2d 881 (Fla. 1954). These citations will be reviewed in detail since they do not support the Defendant's contention.

The obvious and vital distinction in *Finston v. Finston, supra*, is that the property rights in question were before the Court and there was no fraud involved. As the Court stated at page 937,

> "It further appears from the pleadings in the named suit that the property rights in question were before the Court when final decree was entered and were adjudicated, so that the doctrine of res adjudicata was a proper defense to raise here and should have been permitted."

In *Dotter v. Dotter, supra*, there was no contention that property of the parties had been fraudulently or otherwise concealed. The property in question was before the trial court as revealed by the Dotter opinion at page 210:

> "Before the Chancellor in the divorce proceeding were the property rights of the parties. The final decree was rendered, as we have indicated, and no appeal from it has been taken."

[41] Therefore, the Second District held that subsequent orders by the same trial court relating to property rights were not proper. The case has no application to a situation in which property was not revealed during the divorce proceeding, where the parties withdrew the division of property from the consideration of the court and reserved rights to seek a fair division of any property subsequently revealed, where the judgment of the court stated that property questions were not before the court, and where the subsequent action is not an attempt to have the trial court modify its order after the time for appeal is run, but rather, is a separate action upon equitable principles to establish rights in property which had not been previously disclosed.

The parties to *Jones v. Jones, supra*, had been previously divorced in Kentucky. The Kentucky decree approved a settlement of property rights which included a full release by the wife. The husband's interest in a certain Hub Trust on Florida realty was known and considered at the time of the Kentucky settlement which was approved by the Kentucky decree. This is made clear from the Jones opinion at page 320:

> "John's interest in the Hub Trust was known and taken into consideration at the time of the property settlement involved in the divorce proceeding..."

Subsequently the wife brought a suit in Dade County, Florida, to establish a resulting trust in the same Hub Trust properties. In this situation the Florida court rightfully declined to re-open the property question since it had previously [42] been adjudicated and there were no allegations of fraud or concealment.

In *McEachin v. McEachin, supra*, a Florida Circuit Court entered a final decree of divorce and determined property rights. The trial court retained jurisdiction,

> "for the entry of such other and further orders as may be proper herein, and for the purpose of modifying any orders herein." (p. 895)

This was done in July of 1962 and in September of 1962 the husband asked for change of visitation and custody rights. At that time the trial court modified its final decree as to property rights.

The First District held that the Chancellor could modify custody questions but could not modify property rights since there are different bases for retaining jurisdiction permissible as to custody but not permissible as to property. Note that the property rights in question and the specific property involved were before the court when the original order was entered.

The McEachin case stands for nothing more than to indicate that mere general language reserving jurisdiction cannot bestow jurisdiction otherwise lost by final decree and no appeal. Such a holding had nothing whatsoever to do with fraud, undisclosed holdings and other causes which would invoke the "recognized processes of equity," as recognized by the First District in McEachin at page 87 citing *Cortina v. Cortina*, 98 So. 2d 334 (Fla. 1957). The Plaintiff here is seeking a recognized process of equity to establish a resulting trust.

[43] In *Cooper v. Cooper, supra*, a divorce was granted involving a written agreement of settlement. Deeds were executed to the husband per the agreement.

The wife brought a new suit to set aside the deeds claiming threats and force ("pinching legs," e.g.). The Appellate Court said that the subsequent suit was improper and attempted to retry the divorce. The key point was that all the matters alleged with reference to threats and force were known by the wife during the divorce, and obviously such matters had to be raised in the divorce action and not in a subsequent action. It was only in that context that the Cooper court barred a relitigation of property rights which could have been introduced in the divorce litigation even though they were not so introduced.

The Cooper holding was not authority and was never intended to be authority to preclude an action such as the case at bar. This is amply demonstrated by this statement from the opinion of the Florida Supreme Court at page 884:

> "...Nothing now relied upon was discovered by Appellee after the divorce case was ended. All the circumstances

> surrounding the execution and delivery of the deeds were as well known to Appellee when they were happening and the divorce suit pended as they were when she filed the bill in the immediate case."

The distinction between the situation in Cooper and the present case is notable.

Each of the cases cited by the Defendant Wise on the subject of the finality of a divorce decree as to property rights of the parties has been reviewed above to show that none of the [44] cases involved any situation such as that in the case at bar, and the Florida cases cited by the Defendant make no attempt to bar and, in fact, implicity [sic] recognize the propriety of a subsequent case to resolve property rights which were not before the divorce court, which would include cases of fraud or other concealment of assets entitling a Plaintiff to seek the recognized processes of equity.

It should be noted also that subsequent Florida cases cited in 10A Fla. Jur. *Dissolution of Marriage* §258 footnote 14 show that Florida has recognized that a chancellor may enter a post final decree order making an adjudication relative to the determination of property rights, at least where the parties have so agreed and the rights involved are a wife's claim to a special equity in certain of the property. *Farr v. Farr*, 249 So. 2d 761 (3 DCA Fla. 1971). The Florida Jurisprudence section indicates that it is not entirely clear whether a divorce court has power to retain jurisdiction citing *Sistrunk v. Sistrunk*, 235 So. 2d 53 (4 DCA Fla. 1970) on the other side of the question. However, the holding in *Farr v. Farr* has since been approved in *Hyman v. Hyman*, 310 So. 2d 378 (3 DCA Fla. 1975) and followed in the later Fourth District case of *Becker v. King*, 307 So. 2d 855 (4 DCA Fla. 1975). Thus, it is seen that the bar urged as iron-clad by the Defendant Wise is subject to exception and does not purport to preclude action such as the Plaintiff brings here.

The weakness of the Defendant Wise's contention on this point is aptly demonstrated by the strained argument (pages 4 and 5 of Mr. Mitchem's memorandum on this point) that the "interest [45] here in question could have been put in issue in the Texas proceeding, if the parties had desired to do so..." Also, the defense memo argues that Mrs. Estabrook could have received fair treatment if she had "...bothered to bring the

Florida interests to the attention of the Court or otherwise dispose of the same." In the face of the facts that Watson W. Wise, manager and trustee of the community property, failed to reveal in a sworn inventory the existence of these interests, and that Mr. Wise lamely contends that he himself overlooked these interests, it is outrageous to suggest that Mrs. Estabrook did not "bother" to have these interests adjudicated because she did not "desire" to do so.

Defendant Wise contends at page 5 of his memo on this point (citing *Walker v. Walker* which will be treated fully below) that Mrs. Estabrook is somehow barred by the stipulation and order on the basis that the stipulation applied only to community property and is not applicable to the Florida property in question. Such an argument defies the plain intent and language of the stipulation and the judgment entered pursuant thereto indicating that all matters with reference to "community property rights or other property rights" are eliminated from the cause with the parties retaining their rights to pursue any after-discovered assets.

* * * * *

EXCERPTS FROM BRIEF OF APPELLANT IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

* * * *

[18] Community property consists of all property acquired during the marriage other than by gift, devise or descent or in exchange for separate property and also includes the income of all property of the spouses, both separate and community. Tex. Family Code §5.01(b).

* * * *

[19] At all times material to the disposition of this controversy, Article 4619 of the Texas Revised Civil Statutes was in full force and effect. That statute reads in part as follows:

> "Article 4619. — Community Property
> §1.

> All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the community property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only..."

* * * *

EXCERPTS FROM BRIEF OF APPELLEES IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

* * * *

[15] As a general rule, it is stated that presumptions are procedural matters and the forum need not apply presumptions arising in other jurisdictions. *See Annotation, Governing Laws as Regards Presumption and Burden of Proof,* 78 A.L.R. 883 (1932); *Leflar, supra,* at 124.

The Florida Supreme Court has stated that questions of presumptions are for the law of the forum to resolve. *United Mercantile Agencies v. Bissonnette,* 155 Fla. 22, 19 So.2d 466 (1944). Also, it is noted in 6 *Fla. Jur., Conflict of Laws* §41 that questions of evidence, which encompass presumptions and burdens of proof, are governed by the law of the forum. In other words, the general rule is that presumptions from other jurisdictions do not apply in proceedings in Florida. This initial inquiry thus suggests that the Texas presumption can have no bearing on this Florida court's determination of appellant's rights in the consideration used to purchase the Florida real property.

The appellees recognize that other jurisdictions have created an exception to the general rule noted about presumptions. Sometimes the presumption is said to be more than procedural, being conclusive and irrebuttable, or so [16] inextricably bound to a right that it is deemed "substantive." The exception provides that in such cases the presumption from another jurisdiction is to be applied in the forum state. *Annotation,* 78 A.L.R. at 888. Appellees urge, on several bases,

that the Texas community property presumption is not within such an exception, but is a procedural matter only, which need not be applied in this court.

Evidence of the procedural nature of the presumption is found in several sources. The first very important indicia that that presumption has only evidentiary effect, and is not substantive, is the fact that in Texas the presumption merely causes a shift in the burden of production of evidence. The presumption does not shift the burden of proof (persuasion) on the issue of the character of property as community or separate. *Gillespie v. Gillespie*, 110 S.W.2d 89 (Tex. Civ. App. 1937); *Daggett v. W. B. Worsham & Company*, 264 S.W. 180 (Tex. Civ. App. 1924). As stated in the Treatise on Texas Evidence by Dean McCormick, noted authority and author of *McCormick's Handbook of the Law of Evidence:*

> It is no where denied that the presumption has at least the effect of placing the burden of evidence on the party asserting the separate character of the property. But whether it has any effect on the burden of persuasion is more difficult problem and a matter on which our courts are not in agreement. A part of the difficulty results from the indiscriminate use by our courts of the term "burden of proof." A further complication is the failure generally to
> [17] indicate where the burden of persuasion should rest in the first place. The statement is often made that the burden of proof rests upon the party asserting the separate character of the property. In some cases the location of the burden or persuasion is made to depend upon whether the separate character of property was pleaded, or whether the party merely pleaded a general denial to the opponent's assertion that the property was community. It is believed that this distinction is unsound. The better view is represented by those cases which hold that the burden of persuasion is not affected by the presumption. *McCormick and Ray, Texas Law of Evidence*, §116.

More recently, the Texas Supreme Court in *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354 (Tex. 1971), in a case dealing with another presumption, asserted that in Texas presumptions do no more than shift the burden of going forward with the production of some evidence. Later in *Wohlenberg v. Wohlenberg*, 485 S.W.2d 342 (Tex. Civ. App.

1972), the *Robertson Tank Lines* rationale was applied to the community property presumption, further reinforcing the view of Dean McCormick. It should be noted, too, that the community property presumption is unquestionably rebuttable. *Hodge v. Ellis*, 277 S.W.2d 900 (Tex. 1955). This is further evidence of its procedural nature.

Finally, in assessing whether this presumption is but a procedural matter, it is helpful to consider what effect upon other states' real property may have been intended with the enactment of the statutory presumption. Texas does follow [18] the usual rule that real property is exclusively subject to laws of the sovereignty within whose territory it is situated, *Erwin v. Holliday*, 131 Tex. 69, 112 S.W.2d 177 (1938). In the case of *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ. App. 1944), it is stated:

> The status of lands, as to being separate or community, is to be determined by the law of the state where they are situated.

It may be supposed that the presumption is not intended to be applied where, as here, it would alone be the basis for an implied trust in Florida real property. To say so suggests that a procedural device, without more, rises to the level of clear, strong, unequivocal evidence necessary to show an implied trust. *Lofton v. Sterrett, supra.*

The presumption, being a procedural device, need not be applied by this court. Without the aid of this presumption, appellant admittedly cannot substantiate any interest in the consideration used to purchase the property, and it follows that no interest could then be shown in the real property. For this reason the appellees urge that summary judgment was properly entered in their favor.

* * * * *

[20] Returning to the particular questions raised in the beginning of this section, attention is now directed to the following: how, or by what quality of evidence, can the presumption be rebutted? Appellant would have this court believe that the answer to this question is certain. The appellees

disagree. Turning once again to the work of Dean McCormick, the authority on Texas law relied upon by appellees, the following is noted:

> Closely interwoven with the matter just discussed is the degree of evidence required to overcome the presumption. Here again there is conflict in the decisions. Frequently the courts say the presumption can only be overcome by "clear and convincing evidence." The problem is partly statutory in origin since one of the clauses of Article 4619 includes the requirement of "satisfactory proof." Based upon the wording of the statute the Supreme Court has made what is believed to be a questionable distinction between property "acquired during the marriage" and property "possessed upon dissolution of the marriage," saying that as to the former only a preponderance of evidence is required to overcome the presumption of community. [Citing *Page v. Henderson*, 129 Tex. 652, 106 S.W.2d 673 (Com. App. 1936)]. On the other hand there is authority to the effect that the mere production of evidence of the separate character of the property will destroy the presumption and leave the burden of persuasion on the Party asserting that
> [21] the property is community. [Citing *Daggett v. W. B. Worsham & Company*, 264 S.W. 180 (Tex. Civ. App. 1924)]. *McCormick and Ray, supra*, §116.

In this same section above quoted, Dean McCormick also notes the "settled rule that it is error to instruct the jury that any issue requires proof greater than a preponderance of evidence," citing *Sanders v. Harder*, 148 Tex. 593, 227 S.W.2d 206 (1950). Thus, though the Texas law is apparently not certain, it seems safe to say that the community property presumption may be overcome with less than "clear and convincing" evidence.

* * * * * * *

[22] The Texas Supreme Court has set forth its view of a rebutted presumption in the *Robertson Tank Lines* case, *supra*. The effect of rebuttal is to make a presumption vanish, or as more particularly stated:

> . . .[in the face of positive rebuttal] the presumption is nullified and the burden is then upon the plaintiff to

> produce other evidence or his cause fails. . .(emphasis the court's)." 468 S.W.2d at 358.

Moreover, the court in *Robertson Tank Lines* held that the facts giving rise to the presumption, without additional affirmative evidence, did not even constitute probative evidence of the presumed conclusion. *Id.*

[23] This court is familiar with the related Florida rule that when a rebuttable presumption is met with rebutting evidence, the presumption vanishes and is of no probative value. *See Gulle v. Boggs*, 174 So.2d 26 (Fla. 1965); *Nationwide Mut. Ins. Co. v. Griffin*, 222 So.2d 754 (4th DCA Fla. 1969).

Appellees therefore argue that appellant has no basis for her claim, even if the device of the Texas presumption should be held applicable in this Florida forum. The result is that her claim was properly denied on summary judgment because she has no basis to substantiate it.

* * * *

III

[31] APPELLANT IS BARRED BY LACHES FROM NOW ASSERTING ANY CLAIM IN THE FLORIDA REAL PROPERTY.

Another issue brought to the circuit court by the motions for summary judgment was that of laches. The defendants there argued that even if there should be some technical basis to now give appellant an interest in the Florida property, then nevertheless any claim based upon that interest must now be barred under the equitable doctrine of laches.

Laches is a kind of negligence in failing to seasonably assert rights, or allowing an unexcusable delay in the assertion of rights during which time adverse rights to premises have been acquired which make it inequitable to displace the adverse rights. Equity will ordinarily deny relief to a complainant guilty of laches. 21 *Fla. Jur., Limitation of Actions*, §§91 et seq. Often a court will turn to statutory periods of limitation as an appropriate guideline in determining a suitable period to define laches. *General Properties Company v. Rellim Investment*

Company, 151 Fla. 136, 9 So. 2d 295 (1942). The appropriate statutory period of limitation applicable to the case at bar is found in §95.23, *Florida Statutes*, (1973) [now in the new §95.231], providing in part:

> After the lapse of twenty years from the record of any deed . . . purporting to convey lands no person shall assert any claim to said lands as against the claimants under such deed . . . , or their successors in title.

[32] A cause of action very similar to that asserted by appellant was barred by laches in the case of *Wadlington v. Edwards*, 92 So.2d 629 (Fla. 1957). In *Wadlington*, a widow asserted a beneficial interest in land acquired by her husband in 1934. The title was taken in the name of her husband alone, and the widow alleged that the title was taken in her husband's name against her will and without her knowledge or consent. She claimed that the purchase price was paid with funds from her separate estate, thus giving rise to her equitable interest.

The Supreme Court in *Wadlington* first disposed of the question of the kind of implied trust sought to be impressed against the property. The Court found that what was at issue was a "constructive" trust, and not a resulting trust. It should be noted that under the guidelines there delineated, the appellant can only be seeking application of the constructive trust remedy. The essential difference of the two implied trusts is the element of intent. A resulting trust depends upon the intent of the parties, and it is essential that the intent to create the claimed interest be found. On the other hand, a constructive trust is but an equitable remedy, not a "trust" at all, which is applied in spite of or contrary to the parties' intent. 96 So.2d at 631. The constructive trust is created to prevent unjust enrichment, whether it arises from fraud, abuse of confidence, or even from mistake. *Id.* Nothing suggests that Watson Wise intended for the appellee [33] to ever have any interest in the property at issue. At the time the properties were purchased, appellee Wise clearly understood and intended that they were his father's because they were purchased with his father's funds. (Watson depo. p. 17, 21/R 346, 350). Later, Watson's father gave the properties to him and to his sister (Watson depo. p. 41/R 370), at which time the properties became a part of Watson's separate properties. As acknowledged by appellant,

(Estabrook depo. p. 6/R 474), appellee Wise was accustomed to having and maintaining certain properties as his sole properties throughout the marriage.

In *Wadlington* the Supreme Court went on to hold that because a constructive trust has its inception in an antagonistic relationship, any rights of the beneficiary accrued at one of the following times: when the deed was recorded, when the beneficiary knew of a potential right, or when the beneficiary should have known of the adverse claim of the asserted trustee. 92 So.2d at 632.

The following facts are important in comparing *Wadlington* and the instant case. The evidence shows that Watson Wise purchased the properties in issue and in some cases recorded the deeds therefor, in the period of about 1944-46 (Complaint, p. 3/Interrogatory to Watson No. 3(d)). Other evidence suggests that the appellant had actual knowledge of her husband's Florida transactions because she eventually recalled some of them. In her own deposition, the appellant related several times that [34] once her memory was jogged by the enticement of Mr. Farrington's proposal, she did indeed begin to piece together recollections of her husband's business, (Estabrook depo. p. 15, 43, 65/R 483, 511, 533). She was raised in the oil business, (Estabrook depo. 4/R 472), and she knew that frequent travels to secure mineral interests were a part of that business (Estabrook depo. p. 15/R 483). Indeed, she knew that her father and husband had business dealings together, (Estabrook depo. at 12/R 480). It was stated by Mr. Edgar Turman that the appellant told him "...that she recalled there had been some trips over there and back [to Florida]. And she did recall that during that time there was some business done in that area [Florida], but that she was not aware of exact particulars...." (Turman depo. p. 35/R 464). Other facts in the case suggest that appellant had actual knowledge of her husband's transactions or should be imputed with such. As previously noted, not only were deeds recorded in the transactions of public record for decades, but also in some cases the appellant actually signed subsequent deeds reflecting transactions in which her husband transferred interests first acquired around 1945. (Estabrook depo. p. 19-22/R 487-490).

The doctrine of laches is never applied as a bar by virtue of nothing more than delay. *Anderson v. Northrop*, 30 Fla. 612,

12 So. 318 (1892). It is said that an ad interim [35] third party must act to his detriment in reliance upon such neglect, or that the delay must operate to the disadvantage of this other party. *See Seaboard All Florida v. Underhill*, 105 Fla. 409, 141 So. 306 (1932). Here we have defendant Phillips interposed as a third party who reasonably relied upon the state of the record title of these properties in Mr. Watson Wise.

A compelling equity may be found upon considering the basic rationale for limitations upon actions. Namely, limitations are designed to prevent undue delay in bringing suits on claims and to suppress fraudulent and stale claims after vouchers and evidence are lost and after facts have become obscure from the lapse of time, defective memory, or the death and removal of decisive witnesses.

It is a fact that here important evidence regarding the character of this property is forever lost. Numerous important, perhaps decisive witnesses are now dead. For example, among the deceased are: William A. Wise, father of appellee Wise, and one who would obviously be vital to establish the validity of the claim that the funds came from the father (Watson depo. 11/R 340); Robert Windfohr, friend and confidant of Watson who may have known of Watson's arrangements (Watson depo. p. 33/R 362; Estabrook depo. p. 16/R 484); R. J. Ranck, brother-in-law of Watson Wise, who not only knew of the arrangements made by William A. Wise, but who also was offered the very [36] same proposition which appellee Wise acted upon (Watson depo. p. 19/R 37); and still more, such as H. C. Milhoan (Watson depo. p. 19/R 348); Marry and Marry (Watson depo. p. 28/R 357); E. L. Orr (Estabrook depo. p. 24/R 492); Bob Porterfield (Estabrook depo. p. 18/R 486); Mr. McKelvey (Turman depo. p. 11/R 441), and other unnamed office workers (Estabrook depo. p. 14/R 482).

The facts in this case as they relate to laches must also be tied back to the stringent burden of proof needed to show an implied trust. Illustrative is the *Geter v. Simmons* case, *supra*, which denied a resulting trust, stating:

> But again, in our view, the evidence adduced to establish the alleged resulting trust in the complainant's favor, when viewed under the shadows and obscurity cast by the long lapse of time since the occurrences testified about, is not so clear, convincing, and free from reasonable doubt as to justify a court of equity in disturbing the title to real estate. 49 So. at 134.

Thus here, as in *Wadlington*, appellant is barred by laches from pressing this stale claim against Watson Wise's property.

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EXCERPT FROM REPLY BRIEF OF APPELLEES IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

* * * *

[1] Statement of Additional Facts

The Appellee-Defendant, Watson W. Wise, filed an amendment to his Answer and Additional Affirmative Defenses (R 95-96) on August 26, 1975, and therein stated:

Sixth Affirmative Defense

> That this action is barred by virtue of the final decree of divorce entered in the Court of Domestic Relations in and for Smith County, Texas, in that certain case bearing No. 64-480 in which Louise Orr Wise, now Louise Orr Estabrook, was the plaintiff and Watson W. Wise, defendant, copy of which final judgment is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

The plaintiff filed her Reply to the above quoted Affirmative Defenses (R 99) on September 29, 1975 and, did not plead the applicability or the substance of Texas law as to this defense. At the pre-trial conference on November 10, 1975, it being stipulated that motions for summary judgment previously filed would be heard at that time, neither Texas law nor the applicability thereof were argued or in any way presented to the Court, or introduced as being applicable in this issue. The Court below correctly applied Florida law and entered its Final Summary Judgment (R 264) in favor of all defendants.

In Appellant's main brief filed herein, Appellant does not at any time raise any suggestion that Texas law would apply to

this issue. In fact, for the first time in Appellant's Reply Brief, she tries to raise the issue of the applicability of Texas law to determine whether she is barred from bringing this [2] action to determine the title to Florida real property by the prior final judgment of divorce.

ARGUMENT

I. TEXAS LAW IS NOT APPLICABLE BECAUSE IT WAS NOT RAISED AT THE TRIAL COURT.

It has long been established in Florida that there are limitations placed upon the appellant in points which may be raised on appeal. As stated by the Supreme Court in *Hartford Fire Ins. Co. v. Hollis*, Fla. 1909, 50 So. 985, at page 989:

> "(1) It is the policy of this Court to confine the parties litigant to the points raised and determined in the court below, and not to permit the presentation of points, grounds, or objections for the first time in this Court when the same might have been cured or obviated by amendment if attention had been called to them in the trial court."

The purpose of our entire appellate structure is to correct errors of law made by the court below. It is not for the purpose of providing the attorneys an opportunity to re-evaluate their case and seek new and different theories of law upon which their case may be presented.

It is also a well established rule in Florida that if a litigant is to rely upon a law of a foreign state, he must both plead and prove that law at the lower court level. As stated in *United Mercantile Agencies v. Bissonnette*, Fla. 1944, 19 So.2d 466, at page 467:

[3] "Though Section 1 of Article 4 of the Federal Constitution requires that full faith and credit shall be given in each state to the judicial proceedings of any other state, the constitutional mandate entails no obligation upon the courts of justice of sister states to judicially know the law of any other state governing the effect of the judgment in controversy. Questions of presumptions or judicial notice

> are always for the law of the forum. The courts of the forum not being judicially charged with knowledge and hence not bound to take judicial notice of the laws of other states, such foreign laws must be *pleaded and proved* as ultimate facts insofar as it may be necessary to establish the validity of the judgment in the state where rendered." (Emphasis supplied.)

One cannot rely on the law of a foreign state and expect the courts of this state to follow that law unless they are advised beforehand as to what that law is and why it would be applicable. In order for the applicability of foreign law to be raised as an issue on appeal, the question of foreign law must have been raised at the trial court below. *Miller v. Shulman*, 3 DCA 1960, 122 So.2d 890, states this very simply and succinctly at page 590: "the absence from the record of both pleading and proof of foreign law precludes our consideration of this contention raised for the first time in appellant's brief." See also *Brotherhood's Relief & Compensation Fund v. Cagnina*, 2 DCA 1963, 155 So.2d 820; *Jorge v. Rosen*, 3 DCA 1968, 208 So.2d 644; *Movieland, Inc. v. Davis*, 3 DCA 1969, 217 So.2d 890. Therefore, the question raised on appeal about the applicability of Texas law on the *res judicata* effect of the final decree of divorce is totally improper and should not be considered by this Court inasmuch as it was never raised at the lower court level.